BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-210-W/S - ORDER NO. 2004-253

MAY 19, 2004

IN RE:	Application of United Utility Companies, Inc. for Approval of an Increase in its Water and Sewer Services Provided to all of its Service Areas in South Carolina.	))))	ORDER DENYING PETITION TO INTERVENE OUT OF TIME

This matter is before the Public Service Commission of South Carolina (the "Commission") on the March 3, 2004, Petition to Intervene filed by North Greenville College ("NGC") in the above-captioned docket.[1] Applicant, United Utility Companies, Inc. ("United" or "Company"), submitted an Answer in Opposition to NGC's Petition pursuant to 26 S.C. Code Ann. Regs. R. 103-837 (1976) on April 30, 2004.[2] United also filed in support of its Answer the February 20, 2004, affidavit of its employee, John Rick Bryan. Based upon the foregoing and other documents on file with Commission, we issue the within order denying NGC's Petition.

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[1]On April 8, 2004, and April 19, 2004, the Court of Common Pleas for Richland County issued separate orders in C/A Nos. 02-CP-40-5793 and 02-CP-40-5494, respectively, remanding this case to the Commission to give effect to the settlements reached by the parties to separate petitions for judicial review taken from our Order Nos. 2002-214 and 2002-751 in the instant docket. Because NGC's Petition to Intervene was filed prior to the Commission's receipt of the Circuit Court's written orders, the Petition has been held in abeyance pending the receipt of the court's orders.

[2]United had also opposed the Petition in a letter from its counsel dated March 8, 2004, asserting that the NGC petition was premature because no orders from the Circuit Court had yet been issued remanding the matter to the Commission.

FINDINGS OF FACT

1. On April 25, 2000, United filed with the Commission written notice of its intent to submit an application for approval of a rate adjustment as required by S.C. Code Ann. §58-5-240(A)(Supp. 2003). On April 28, 2000, the Executive Director assigned the above-captioned docket number to the matter.

2. On August 8, 2001, United instituted a proceeding for approval of an expansion of its service area to include NGC's campus and certain adjacent properties owned by Greenville Timberline, LLC (the "Developer") by way of an application which was filed in Docket 2001-355-S. By Order No. 2001-1070, dated November 21, 2001, the Commission approved this application. This expansion arose from a July 9, 2001, contract between United, NGC, and the Developer pursuant to which NGC would transfer to United a wastewater treatment facility, which contract was contingent upon approval of the expansion application. See Order No, 2001-1070 at 3; Bryan Aff. at 2, ¶5. *Inter alia*, this contract provided that "[w]astewater usage charges and service fees shall be rendered by Utility in accordance with Utility's rates, rules and regulations and conditions of service **from time to time on file with the Commission and then in effect**." Bryan Aff., Exh. "B", ¶7(a) (emphasis supplied.) In its application, United requested that "it be allowed to provide service in the [proposed expanded] Service Area pursuant to the terms, conditions, rates and charges set forth in its existing rate schedule, as may be changed from time to time as a result of any rate proceedings that might be brought before the Commission, **including those in Docket No. 2000-0210-W/S**." See Bryan Aff., Exh. "C", ¶5 (emphasis supplied.) Prior to entering into the July 9, 2001,

contract, NGC's authorized representative was orally advised by Mr. Bryan that United intended to seek an increase in its service rates. Bryan Aff. at 2, ¶4.

3. Thereafter, on September 24, 2001, United filed its application for a rate adjustment in the instant docket. As instructed by the Commission's Executive Director, United timely published a notice of its application in The Greenville News, The Spartanburg Herald and The Anderson Independent, which notice described the rate adjustment sought and established a deadline of November 26, 2001, by which interested parties must file a petition to intervene in this docket. In October of 2001 and subsequently, NGC's president and its authorized representative were both orally advised by United of the amount of rate increase being sought in this docket. Bryan Aff. at 2, ¶6.

4. At the request of Commission Staff, NGC on November 29, 2001, acknowledged in a writing addressed to the Commission that NGC was aware of the proposed rate increase sought by United in the instant docket. See Bryan Aff. ¶7 and Exh. "D". This document was contemporaneously provided to Commission Staff Counsel Belser.

5. A night hearing in this docket was held in Spartanburg County on November 27, 2001. A public hearing was conducted in this docket by the Commission in its offices on February 6, 2002. Order No. 2002-214 at 3.

6. At no time while this matter was initially pending before the Commission did NGC seek to intervene, enter an appearance, testify or otherwise participate in this docket. Order No. 2002-214 at 2.

7. Thereafter, the Commission issued its orders in the instant docket, both of which were the subject of separate petitions for judicial review filed by United and the Consumer Advocate in the Circuit Court in November, 2002.

8. On January 21, 2004, NGC filed Petitions to Intervene in both of the Circuit Court judicial review proceedings. In its orders remanding these matters to the Commission, the Circuit Court denied NGC's Petitions on the ground that the parties had settled the cases.

CONCLUSIONS OF LAW

1. Initially, we note that NGC has not identified the legal authority under which it seeks to intervene out of time.[3] While the Commission's regulations do permit the filing of pleadings after established deadlines, a person or entity seeking leave to do so must demonstrate good cause for the granting of such permission. See Vol. 26 S.C. Code Ann. Regs. R.103-842(1976). Also, where a person or entity can demonstrate that compliance with the Commission's regulations will work an unusual hardship or difficulty, compliance can be waived by the Commission. See Vol. 26 S.C. Code Ann. Regs. R.103-803 (1976). In the instant case, NGC has not demonstrated good cause why the Commission should permit it to file a Petition to Intervene after the deadline established in this docket. Nor has NGC requested a waiver of R. 103-842. And, even if

[3]NGC makes much of the fact that it has an interest in this case because it is, upon information and belief, United's "largest customer" in Greenville County and previously owned the wastewater treatment plant described in our Order No. 2001-1070 in Docket No. 2001-355-S. NGC Petition at 1-2, ¶¶ 3-4. For purposes of this order, we accept NGC's contention that it has an interest in the matter underlying this case. As the discussion below reflects, however, the Commission does not agree with NGC that this interest alone entitles NGC to intervene now for the purpose of "opposing the rate increase sought by United." Id.

it had requested such a waiver, NGC has not shown that enforcement of the time deadline for intervention in this docket will give rise to unusual hardship or difficulty such that it should be waived. The only result from a denial of the NGC Petition will be that it will continue to be charged the same rate for sewer service that the Commission has determined in accordance with the law to constitute a just and reasonable rate and that is applicable to other customers. We find that this poses neither an unusual hardship nor difficulty upon NGC. Accordingly, no basis for NGC's proposed intervention out of time exists under the Commission's rules.

2. Moreover, NGC's Petition to Intervene is untimely. **At a minimum**, NGC has waited some two years and four months **after** it became aware of the pendency of United's application to seek to intervene in this docket. Although our regulations do not speak specifically to interventions in matters before the Commission, case law interpreting the rules applicable to intervention in Circuit Court lends further support to our conclusion. Rule 24 of the South Carolina Rules of Civil Procedure (SCRCP) requires that an application to intervene be timely.

Our Supreme Court has adopted a four-part test for determining timeliness of an application to intervene: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. *Ex Parte Reichlyn*, 310 S.C. 495, 427 S.E.2d 661, 664 (1993); *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601, 603 (1991). Failure to satisfy any one of the requirements of this test

precludes intervention. *Id.* Our examination of each of these requirements compels us to deny NGC's Petition.

First, NGC has not refuted the assertion by Mr. Bryan of United that NGC has known of this proceeding, if not since the first time its authorized representative met with Mr. Bryan of United, then certainly since November 29, 2001, when it acknowledged in writing to the Commission that it was aware of the pendency of the rate case. Thus, **at least** two and one-half years have passed since NGC became aware of its interest in this case but before it sought to intervene. We find that this is too great a period of time for NGC's motion to be considered timely.

Second, NGC has offered no reason for its delay in seeking intervention, particularly in view of its knowledge that the matter was pending. Although it contends that it was contractually entitled to a rate different than that which results from our decision in this docket, we find no evidence to support this contention. To the contrary, both the application for expansion of the United service area to include NGC's campus in Docket No. 2001-355-S and the contract giving rise to that docket contemplate that NGC would be charged such rates as this Commission might approve and place into effect from time to time.[4] And, if NGC had been relying upon a belief that it was entitled to a "contract" rate, it would be reasonable to assume that it would have so qualified the

[4]Moreover, even assuming that NGC had some basis for believing that it would be charged some lesser rate than that adopted in this docket, we find that NGC consciously slept on any right it may have had to raise this issue in light of the fact that it has been charged rates in excess of those it now contends it is contractually entitled to pay since at least August of 2002 when the Company's rates were increased under bond during the pendency of the appeal pursuant to § 58-5-240 in accordance with our Order No. 2002-494 in the instant docket. Thus, NGC had been charged an amount even greater than that we approved in Order No. 2002-214 for more than a year and a half before it ever contended that it was being charged an incorrect rate.

written acknowledgment of the pending rate case it provided for the Commission in November, 2001. That it did not do so is, in our view, further evidence that NGC was aware that it would be charged the rates resulting from our decision in this docket. Thus, NGC has not established a reason justifying its delay in intervening.

Third, this matter not only progressed to a hearing on the merits, but a final decision was reached by this Commission, petitions for reconsideration submitted to us were acted upon, and petitions for judicial review were filed and pending before NGC ever acted. NGC could hardly have delayed any longer in seeking to intervene. We conclude that intervention after a final decision has been reached on the merits, the subsequent appeal has been settled, and the case remanded by the appellate court to give effect to the parties' settlement comes far too late in the progress of the litigation to be considered timely.

Fourth, it would be manifestly unfair and prejudicial to the parties of record to permit NGC to intervene at this late date, particularly since the parties in this docket have completed the administrative litigation portion of the case and then resolved the subsequent petitions for judicial review. The Consumer Advocate has represented the interest of the consuming public in this matter and has negotiated a resolution that he believes to serve the public interest. The Company has committed to accept a rate less than that originally sought and to effect refunds to the customers. The Staff will no longer be required to expend resources defending an appeal from the orders in this case. Were we to permit NGC to intervene for its own purposes, this resolution could conceivably be undone and the benefit to the consumers, the Company and the Staff achieved thereby

adversely affected. We find this to constitute prejudice to the parties of record. We also conclude that NGC will not suffer any prejudice since, on its face, the July 9, 2001, contract it entered into with United contemplates that the rates to be charged by United will be those set by the Commission and in effect from time to time. NGC will not be charged any rate other than one set by this Commission as a result of a denial of its petition. As already noted, NGC has not asserted any substantive basis upon which it would challenge the rates requested other than its contention that its contract with United contemplates a specific rate different than that approved for United's other customers.[5] Because we find that the contract specifically contemplates the exact opposite, denial of the petition to intervene does not work any prejudice on NGC. Accordingly, NGC fails to satisfy this requirement of the four part test for a timely intervention.

3. In addition to the foregoing, we find that NGC may not intervene as a matter of law. *See Ex Parte Reichlyn*, *supra*. (holding that settlement on appeal of an administrative law matter by the parties thereto results in "no ongoing judicial 'action' into which [a third party] can intervene.") As a result of the parties' settlement, there is no ongoing proceeding into which NGC may intervene. We further note that permitting NGC to intervene in contravention of the holding in *Ex Parte Reichlyn* would also

[5]NGC alleges in its Petition that rates in excess of its "contract" rates "are causing substantial harm to its economic viability." NGC Petition at 3, ¶10. Of course, proof of this assertion would require the submission of additional evidence for evaluation by this Commission – an undertaking that we find to be beyond the scope of our authority on remand in this case. See discussion in ¶4, *infra*. Moreover, the Commission takes notice of the fact that utility service charges are one of many operating expenses that NGC must incur and expresses doubt that a difference in United's rate would alone cause such financial distress.

prejudice United's rights under the fourth prong of the test adopted in *Davis v. Jennings*, *supra.*

CONCLUSION

It has long been the practice of this Commission to permit interventions in proceedings out of time where a matter has not yet been decided by the Commission and the intervention does not prejudice the parties of record. Typically, petitions to intervene out of time are submitted within a short period of time after the intervention deadline has run and are not opposed by the other parties of record. Here, however, NGC seeks to intervene not simply out of time, but long after the matter has been decided by the Commission. Further, the related appeals have been settled by the agreement of the parties and the potential undoing of that settlement would unfairly prejudice the parties. This case presents an unusual circumstance and the result we reach is limited to its particular facts. And under those facts, the Commission finds that the petition should be denied for the reasons stated above.

IT IS THEREFORE ORDERED THAT:

1. The Petition to Intervene Out of Time of North Greenville College is denied.

BY ORDER OF THE COMMISSION:

/s/
Mignon L. Clyburn, Chairman

ATTEST:

/s/
Bruce F. Duke, Executive Director

(SEAL)